91-1445

No. _____

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JANINE ADAMICK, JOSEPH ADAMICK, and THE ESTATE OF KATHLEEN JO PRICE, Deceased,

Petitioners,

vs.

AMEX, INC., formerly FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California Insurance Company, NEVADA FEDERAL CREDIT UNION, UNITED FIDELITY Insurance Company, a Texas Insurance corporation, BENEFIT CONSULTANTS, INC. a California corporation, and EQUIFAX SERVICES, INC., a Georgia corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals so far departed from the usual course of proceedings in contravention of 28 U.S.C. 1332(a)(1) and 1447(d), Federal Rules of Civil Procedure 54(b), 79(a) and Federal Rule of Appellate Procedure 31(a) by denying petitioners the right to raise timely appealed issues and to file an Opening Brief, and by dismissing one appeal because petitioners could not file a brief leaving out valid issues' for want of prosecution, as to deprive petitioners of their constitutional right of access to the courts?

2. Whether insurance companies abuse federal diversity jurisdiction by filing harassing declaratory judgment actions against a non-beneficiary of life insurance proceeds which would be barred in

state court and whether the district court erred in "referring" the issue of payment to a state court action which had been remanded for want of complete diversity, in which state court the Estate of Price can not litigate her abuse of process claims against Amex, Inc.?

PARTIES

The parties in the court below are listed on the cover. The appeal con-concerned only piecemeal orders cert-ified under Fed. R. of Civ. Pro. 54(b), but as the court of appeals addressed non-final orders as to the other defend-ants, petitioners list them in the cap-tion and will serve courtesy copies on these parties.

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1. The Ninth Circuit Has So Far Departed From The Usual Course Of Judicial Proceedings And Sanctioned Such A Departure By The District Court As To Call For The Exercise Of This Court's Supervision And To Deprive Petitioners Of Their Constitutional Right Of Access To The Courts And Property RightsIn These Civil Insurance Diversity Actions.

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2. INSURERS SUCH AS AMEX ABUSE FEDERAL DIVERSITY JURISDICTION BY FILING FRIVOLOUS DECLARATORY JUDGMENT ACTIONS AND AN AMENDED COMPLAINT AGAINST A NON-BENEFICIARY ESTATE WHICH WOULD BE BARRED IN A STATE COURT, BY FILING SUIT WITHOUT DENYING ADAMICK'S CLAIM OR GIVING A REASON FOR NOT PAYING AS REQUIRED UNDER NEVADA LAW, AND PETITIONERS WILL BE DENIED A REMEDY AS THE ESTATE'S ABUSE OF PROCESS CLAIM CAN NOT BE LITIGATED IN THE REMANDED STATE COURT ACTION. 15

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PROVISIONS

STATUTES AND RULES

First, Fifth and Fourteenth Amendments To The United States Constitution

United States Supreme Court Rule 10(a)(1)

The petitioners, Janine Adamick, individually and as Administratrix of the Estate of Kathleen Jo Price, Deceased, respectfully pray that a writ of certiorari issue to review the order of a motions panel of the United States Court of Appeals for the Ninth Circuit entered on August 22, 1991, as to appeal No. 91-15575 only, and the procedures of the the court of appeals in implementing Circuit Rules 11-3, 11.4.1, 27.7, 30-1 and 33.1.

ORDERS BELOW

The orders of the United States Court of Appeals for the Ninth Circuit and of the United States District Court for the District of Nevada were not reported. The partial judgment of the district court was certified as a final order under Federal Rule of Civil Procedure 54(b) and was entered on November

26, 1990 in consolidated Cases CV-S-85-146-HDM, Fireman's Fund American Life Insurance Company v. Janine Adamick and The Estate of Kathleen Jo Price, Deceased, and CV-S-86-306-HDM, Janine Adamick, Joseph Adamick, and Estate of Kathleen Jo Price, Deceased v. Nevada Federal Credit Union, et al., and is appended at App. 8, infra.

The order of the court of appeals dismissing unconsolidated appeal 91-15575 was entered on August 22, 1991 and is at App. 2. An Order dismissing appeal No. 91-15947 for want of entry of any appealable order, to which dismissal petitioners consented, was also entered on August 22, 1991 and is at App. 1.

JURISDICTION OF THIS COURT

The order of a motions panel of the United States Court of Appeals for the Ninth Circuirt in No. 91-15575 was filed on August 22, 1991, App. 2. The

Order denying rehearing, which erroneously also included No. 91-15947, as set out, supra, was entered on November 1, 1991, App. 15.

The jurisdiction of the court arises under 28 U.S.C. §1254(1), and petitioners also respectfully invoke the court's jurisdiction under 28 U.S.C. §2106 and Supreme Court Rule 10.1.(a).

The jurisdiction of the district court was founded in both consolidated cases under 28 U.S.C. §1332(a)(1) and that of the court of appeals rests on 28 U.S.C. §1291.

By Order of January 24, 1992, the Honorable Sandra Day O'Connor granted an extension of time to February 29, 1992 to file this petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules which are relevant to a determination of this petition are as follows: the First, Fifth and Fourteenth Amendments to the United States Constitution, as the Ninth Circuit's practice of allowing district judges to enter numerous piecemeal orders certified under Fed. R. of Civ. Pro. 54(b) causes so much economic harship as to deny access to the courts, 28 U.S.C. §2106, App. 13, Federal Rules of Appellate Procedure 4(a)(1) , Fed. R. of Civ. Pro. 6(a), App. 16, 11, App. 17, 25(a), 31(a), 54(b), text, App. 19, 58 and 79(a), and Ninth Circuit Rules 11-3 and 11-4, App. 21, 27-7, App. 23, 30-1, 30.11 and 31-2, App. 25, 31-1, App. 26, Advisory notes, App. 27, and Supreme Court Rule 10(a)(1), App. 14.

This petition raises the issues of whether 28 U.S.C. §1447(d) barred the district court's order, App. 8, purporting to decline to rule as to whether an insurance company, Amex, Inc., must pay life insurance proceeds in two consolidated diversity insurance actions and to "refer" this "ultimate issue" to a previously remanded state court action for adjudication, and whether the district court could award $9000 in fees under 28 U.S.C. §1923 to a non-prevail-party, Amex, Inc., and that dismissals under Fed. R. of Civ. Pro. 54(b) as to other defendants are invalid under the doctrine that there must be a final order in each federal consolidated diversity insurance action.

Petitioners' adult daughter, Kathleen Jo Price, joined the Nevada Federal Credit Union in September, 1983 and

applied for life insurance issued by Amex, formerly Fireman's Fund American Life Insurance Company, and agreed to have $5 per month deducted from her credit union account for $50,000 of accidental death coverage.

The application required only her signature, name and account number.

Price died on July 19, 1984. The Clerk County Coroner, upon autopsy, determined that Price died from accidental ingestion of (prescription) drugs, and that was no alcohol in the body, no marks or trauma to the body.

Amex did not deny Adamick's claim, but did not give any reason why it did not pay.

Amex filed Declaratory Judgment action in the United States District Court for the District of Nevada, CV-S-85-146-HDM, naming only Janine Adamick, Price's

mother as defendant, invoking only 28 U.S.C. §1332(a)(1) as the basis for jurisdiction. After the Honorable Roger D. Foley denied Amex's claim for Price's medical records, Amex amended its Complaint and added Price's Estate as a defendant, although it is not a beneficiary.

Adamick and ESTATE filed separate counterclaims. Price sues only for abuse of process and malicious prosecution of a civil action. Under Nevada law, the named beneficiary, Janine Adamick, became the owner of Price's policy and insurance proceeds pass outside an Estate, Peters v. Estate of Peters, 92 Nev. 687, 557 P. 2d 713 (1976).

Subsequently, Janine and Joseph Adamick, but not the non-beneficiary Estate, filed a state court action, which was removed and remanded in its entirety for want of complete diversity

of citizenship under U.S.C. §1332(a)(1), text, App. 17. by Order of the district court entered on February 27, 1987, App. 12. In the same order, the court also consolidated the two cases filed originally in the federal court, No. CV-S-85-146-HDM and CV-S-86-306. (The removed action had been docketed as CV-S-86-555.), App. 13, and directed that all papers be filed in the base case, No. CV-S-85-146, App. 13 and 14.

The court issued a partial judgment certified under Civ. R. of Fed. Procedure, App. 33, attempting to "refer" the issuance of payment to the remanded state court action, as set out supra. on November 20, 1990, which was erroneously placed on the docket sheet as of November 23, 1990 but not stamped ENTERED and distributed until November 26, 1990.

Petitioners object to the clerk's practice of assigning a docket number to orders

several days before it is entered, which allows opposing parties and the courts to allege that motions to amend or notices of appeal are untimely.

Fed. R. of Civ. Pro. 79(a) provides in pertinent part that

> The entry of an order or judgment or judgment shall show the date the entry is made.

Petitioner's appeal was docketed as No. 91-15575. Subsequently, the district court entered an order releasing the bond for $51,000 posted by Amex to Amex by Order signed January 25, 1991, which was filed on the docket as of that date, but not ENTERED until January 28, 1991, App. 6. Petitioners' appeal as to this matter was docketed as 91-15947.

The court of appeals erred by listing only one of the two consolidated cases in each appeal, (CV-S-146-HDM in 91-15575) and CV-S-86-306 in No. 91-15947, App. 1.

The court of appeals also erred in listing Amex as the plaintiff and Adamick as the defendant in each consolidated district court case, and by listing Equifax Services as a defendant in CV-85-146-HDM. See App. 1, only 85-146 listed in appeal 91-15947, App. 2. only 85-146-HDM listed in 91-15575, App. 4, listing both appeals with separate lower court numbers, and App. 15.

The clerk's order of July 31, 1991, denied the motion to consoliate and indicated that 91-15947, appeal re bond, was not taken from a final order. Appellants voluntarily dismissed 91-15947, an Order was entered thereon, App.1, dismissing for lack of an appealable order on August 22, 1991. but the court of appeals nevertheless "dismissed" the appeal for "want of prosecution" by Order

denying reconsideration as to both 91-15575 and 91-15947 on November 1, 1991, App. 15 and also noted that "no further filings will be accepted in these closed dockets."

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT AS TO DEPRIVE PETITIONERS OF THEIR CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS, EQUAL PROTECTION OF THE LAWS AND PROPERTY RIGHTS IN THESE DIVERSITY INSURANCE ACTIONS.

The Court of Appeals erred in permitting the district judge to avoid his duty under 28 U.S.C. §1332(a)(1) to make

in these consolidated actions filed originally in the federal court in each instance, and in purporting to "refer" what the district judge stated was the "ultimate issue," i.e. whether Amex must pay insurance proceeds.

28 U.S.C. §1447(d), App. 20, clearly bars such a decision, and this case does not fall into §1447(d)'s only exception.

The district court's failure to rule in these insurance diversity actions, which arose in 1984, have impoverished petitioners who were the original defendants, and this case has been greatly prolonged by the Ninth Circuit's inconsistent rulings, splitting of two consolidated cases and having one appeal apply to one case and the other to the second consolidated cases.

The Ninth Circuit's practice of "double-docketing" has caused filings

in one appeal to be filed in both and has led to a charge that petitioners have filed "duplicative" documents.

The Ninth Circuit declines to correct records and case titles under Fed. R. of Civ. Pro. 60(a).

As set forth heretofore, the court of appeals allows the district court clerk to place an Order on the docket sheet several days before it is ENTERED, thus permitting unethical opposing parties to allege that motions to amend are untimely.

The lower courts have disregarded the plain command of Federal Rule of Evidence 302 which provides that in civil actions the effect of a presumption as to which State law supplies the rule of decision is determined by state law.

Questions of burden of proof of proof are governed by state law in diversity actions, Erie Railroad Co. v.

Tompkins, 304 U.S. 64, 58 S. Ct. 817, (1938), Dick v. New York Life Insurance, 259 U.S. 437, 79 S. Ct. 921 (1959).

Nevada law, Nevada Statutes, the Nevada Administrative Code For Insurance and Nevada presumptions all support petitioners' right to insurance proceeds.

The lower courts err and cause harm to petitioners by permitting entry of numerous Rule 54(b) certified orders, four in this case, and in not recognizing that in consolidated diversity actions, a final order must be entered as to all parties in both cases.

The lower courts fail to heed this court's direction in Curtiss Wright v. General Electric Co., 446 U.S. 1, 100 S.Ct. 1460 (1980).

Petitioners show the court that the district court disregarded and

misapplied 28 U.S.C. §1923, statute which does not permit an award of fees against parties and their counsel, and especially not when insurer Amex, Inc., is not a prevailing party, in that the issue of whether it must pay insurance proceeds was "referred" to the state court.

2. INSURERS SUCH AS AMEX ABUSE FEDERAL DIVERSITY JURISDICTION BY FILING FRIVOLOUS DECLARATORY JUDGMENT ACTION AND AN AMENDED COMPLAINT AGAINST A NON-BENEFICIARY ESTATE WHICH WOULD BE BARRED IN STATE COURT, BY FILING SUIT WITHOUT DENYING ADAMICK'S CLAIM OR GIVING A REASON THEREFORE AS REQUIRED UNDER NEVADA LAW, AND PETITIONERS WILL BE DENIED A REMEDY AS THE ESTATE'S ABUSE OF PROCESS CLAIM CAN NOT BE LITIGATED IN THE STATE COURT.

The petitioners will be denied a

remedy unless they can litigate their counterclaims in the consolidated diversity actions which were filed in the federal court in the first instance.

As the Estate is not a beneficiary, it has no standing in the state courts. The Probate Court found that the Estate lacked standing under Peters, supra, and the Estate did not file an abuse of process claim in the remanded state court civil action.

The federal district judge stated that the parties could "come back" to federal court if the state court declined to lift its stay, but there is no assurance that the federal judge will follow through on said statement if petitioners raise their claims as to payment therein.

Amex filed the first action, seven months after Price's death and without ever first denying the claim and giving

a reason therefore, as required by Nevada statute and the Insurance Code.

Under Nevada law, Amex's actions amount to bad faith and breach of contract and Amex could possibly even be fined.

The Ninth Circuit recently expressed its concern about these "preemptory strike" or redactive actions filed by insurers, many of whom are not the real party in interest. Beneficiaries have the Hobson's choice of expending fees for a lawyer or abandoning their right to payment, whereas the insurer risks little or nothing.

Petitioners challenge the validity of Amex's case under 28 U.S.C. 2202 as there is no real case or controversy to be adjudicated.

Petitioners will have no further recourse in the court of appeals without the intervention of this court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that this Honorable Court grant the Petition For Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Attorney At Law
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Las Vegas, NV 89102
Attorney for Petitioners

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., n/k/a Amex, Plaintiff-counter-defendant/Appellee, vs. JANINE ADAMICK, et al., Defendants/counter-Plaintiffs/Appellants.	No. 91-15947 DC# CV-85-146-HDM Nevada (Las Vegas) ORDER (Filed August 22, 1991)

Before: FLETCHER, LEAVY and T.G. NELSON, Circuit Judges

The motion to dismiss this appeal for lack of jurisdiction is granted.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN FUND AMERICAN LIFE INSURANCE COMPANY, INC., n/k/a Amex, Plaintiff-Appellee, vs. JANINE ADAMICK, individually, et al., and EQUIFAX SERVICES, INC., Defendant.	No. 91-15575 DC# CV-85-0146-HDM Nevada (Las Vegas) ORDER (Filed August 22, 1991)

Before: FLETCHER, LEAVY and T.G. NELSON, Circuit Judges

On June 3, this court ordered that appellants' brief be filed on July 31, 1991. Appellants were warned that no extensions of time would be granted absent a showing of extraordinary circumstances and that failure to comply with the orders of this court would result

in the dismissal of this appeal. On August 2, 1991, this court received a late motion for an extension of time to file the opening brief. See 9th Cir. R. 31-2.3(f). This untimely motion fails to show that appellants are entitled to such relief. Moreover, to date this court has not received an opening brief for this appeal. Accordingly, appellee's motion to dismiss this appeal for lack of prosecution is granted. All other pending motions are denied as moot.

MoCal 8/19/91

APP. 4

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., nka,	91-15575
Plaintiff-Appellee	DC# CV-85-146-HDM
vs.	
JANINE ADAMICK, individually, ESTATE OF KATHLEEN JO PRICE, deceased,	Nevada (Las Vegas)
Defendants-Appellants.	
and	
EQUIFAX SERVICES, INC.,	
Defendants.	
FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC.,	91-15947
Plaintiff-counter-defendant-Appellee,	DC# CV-86-306-HDM
vs.	Nevada (Las Vegas)
JANINE ADAMICK, individually, ESTATE OF KATHLEEN JO PRICE, deceased, et al,	ORDER
Defendants-counter-plaintiffs-Appellants.	(Filed July 31, 1991)

The motion to consolidate these appeals is denied. Moreover, within 21 days of the entry of this order, appellant shall show cause why no. 91-15947 should not be dismissed for lack of jurisdiction. No. 91- purports to be an appeal from the district court's denial of a motion to reconsider its order authorizing the return of a $51,000.00 bond posted by defendant Amex. This does not appear to be a final appealable order of the district court.

Failure to comply with this order within the time set out will result in the automatic dismissal of this appeal by the Clerk pursuant to 9th Cir. R. 42-1.

For the Court:

/s/ MOLLY C. DWYER
Motions Attorney/Deputy Clerk

APP. 6

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, Plaintiff, vs. JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE, Deceased, Defendants.	CV-S-85-146-HDM (Base File)
JANINE ADAMICK, Individually, JOSEPH ADAMICK, individually and ESTATE OF KATHLEEN JO PRICE, by and through its administratrix, JANINE ADAMICK, Plaintiffs, v. NEVADA FEDERAL CREDIT UNION, f/k/a/ NELLIS FEDERAL CREDIT UNION, AND ITS SUBSIDIARIES; FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a TEXAS insurance company, BENEFIT CONSULTANTS, INC., a California corporation, EQUFAX SERVICES, Defendants.	CV-S-86-306-HDM ORDER (Filed January 28, 1991)

The petition of AMEX for the return of the fifty-one thousand dollars ($51,000.00) deposited with the court on June 14, 1990 (#271) is GRANTED. The clerk of the court is directed to remit to AMEX the sum of fifty-one thousand dollars ($51,000.00).

It is so ORDERED.

DATED this 25th day of January, 1991.

/s/ Howard D. McKibben
HOWARD D. McKIBBEN
United States Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, Plaintiff, vs. JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE, Deceased, Defendants.	CV-S-85-146-HDM (Base File)
JANINE ADAMICK, Individually, JOSEPH ADAMICK, individually and ESTATE OF KATHLEEN JO PRICE, by and through its administratrix, JANINE ADAMICK, Plaintiffs, v. NEVADA FEDERAL CREDIT UNION, f/k/a/ NELLIS FEDERAL CREDIT UNION, AND ITS SUBSIDIARIES; FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a TEXAS insurance company, BENEFIT CONSULTANTS, INC., a California corporation, EQUIFAX SERVICES, Defendants.	CV-S-86-306-HDM JUDGMENT IN FAVOR OF AMEX F/K/A FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY AND BENEFIT CONSULTANTS, INC. (Filed Nov. 26, 1990)

Based upon the foregoing Findings of Fact and Conclusions of Law entered herein, the Court

ORDERS, ADJUDGES AND DECREES as follows:

1. AMEX Life Assurance Company, Fireman's Fund American Life Insurance Company and Benefit Consultants, Inc. are entitled to a judgment in its favor against Janine M. Adamick, Joseph Adamick, the Estate of Kathleen Jo Price their privies, assigns, successors-in-interest and others claiming through them on all claims litigated in Cases Nos. CV-S-85-146-HDM and CV-S-86-306-HDM as circumscribed and delineated in the Court's Findings of Fact and Conclusions of Law entered this same date.

2. AMEX is entitled to an award of attorneys' fees in the form of a Judgement, against Janine Adamick, Joseph Adamick, the Estate of Kathleen Jo Price,

and their counsel, Janice M. Hayes, jointly and severally as a prevailing party herein and pursuant to 28 U.S.C. §1923.

3. Other matters, circumscribed in the Findings of Fact and Conclusion of Law, are the subject of deferral by this Court to the good judges of the Eighth Judicial District Court, in Case No. A 247534 styled as Janine and Joseph Adamick, Plaintiffs v. Fireman's Fund American Life Insurance Company, Nevada Federal Credit Union, fka Nellis Federal Credit Union, United Fidelity Life Insurance Company, Benefit Consultants, Inc., Equifax Services, Inc., and any such Judge or Judges of that Court are not constrained by this Judgment or Findings of Fact and Conclusions of Law entered herein from proceeding in Case No. A 247534, by virtue of the principle of comity between State and Federal Courts.

4. This judgment, as a final adjudication of the rights and liabilities of these parties, specifically embodies and incorporates the Findings of Fact and Conclusions of law herein, this date, by my hand.

5. The Court finds that there being no just cause for delay within the intendment of FRCP 54(b), it certifies this order and Judgment as final in favor of AMEX and enters it as final, and accordingly appealable upon its entry and notice as required by law.

DATED this 20th day of November, 1990.

/s/ Howard D. McKibben

HOWARD D. McKIBBEN

United States Judge

APP. 12

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND etc. vs. JANINE ADAMICK, etc.	CV-S-85-146-HDM CV-S-86-306-HDM CV-S-85-555-HDM
JANINE ADAMICK, etc., et al. vs. NEVADA FEDERAL CREDIT UNION	MINUTES OF THE COURT DATED: Feb. 5, 1987
JANINE ADAMICK et al vs. FIREMAN'S FUND etc, et al.	ENTERED (Feb. 10, 1987)

PRESENT:
THE HONORABLE HOWARD D. McKIBBEN UNITED STATES DISTRICT JUDGE

. . .
. . .
. . .

MINUTE ORDER IN CHAMBERS:

IN COURT PROCEEDINGS: HEARING MOTIONS

4:05 p.m. Court convenes.

The following ruling are made concerning

case number CV-S-86-555-HDM; IT IS ORDERED that the plaintiffs' motion for remand is granted and the part of the motion dealing with sanctions is denied (#14 in the file); IT IS FURTHER ORDERED that Equifax's motion to dismiss (#9 in the file), Equifax's motion to disqualify Janice M. Hayes as counsel for the plaintiffs (#10 in the file): United Fidelity's motion to dismiss (#11 in the file); and Fireman's motion to dismiss (#12 in the file) are denied, leaving request for remand (#23 in the file) and motion to vacate (#41 in the file denied as moot.

IT IS ORDERED that defense oral motion to consolidated cases CV-S-86-306-HDM and CV-S-85-146-HDM is granted. Case No. CV-S-85-146, HDM shall be designated as the Base File with all filings made in

this case only.

. . . . . .

CAROL C. FITZGERALD, Clerk

By: XXXXXXXXXXXXXXXXXXXX
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., nka, Plaintiff-Appellee vs. JANINE ADAMICK, individually, ESTATE OF KATHLEEN JO PRICE, deceased, Defendants-Appellants and EQUIFAX SERVICES, INC., Defendants.	No. 91-15575 DC# CV-85-146 HDM
FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., Plaintiff-counter-defendant-Appellee, vs. JANINE ADAMICK, individually, ESTATE OF KATHLEEN JO PRICE, deceased, et al., Defendants-counter-plaintiffs-Appellants.	No. 91-15947 DC# CV-86-306 HDM Nevada (Las Vegas) ORDER (Filed Nov. 1, 1991)

Before: FLETCHER, LEAVY and T.G. NELSON, Circuit Judges

Appellants' Motions to reconsider this court's August 22, 1991 orders dismissing Nos. 91-15947 and 91-15573 are denied in their entirety. A copy of the mandate shall issue forthwith. No further filings will be accepted in these closed dockets.

28 U.S.C. §1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) citizens of different States:

. . . .

(c) For the purposes of this section and section 1441 of this title---

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed

to be a citizen only of the same State as the decedent . . . .

28 U.S.C. §1446

PROCEDURE FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. §1447(d)

PROCEDURE AFTER REMOVAL GENERALLY

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

U.S.C. §1923

Docket fees and costs of briefs.

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers $50 the proctor's docket fee shall be $10.).

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

SUPREME COURT RULE 10(1)(a)

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A petition for a writ of certiorari will be granted only when there are special and important reasonx therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course

of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's jurisdiction.

CIRCUIT RULE 11-3

Retention of the Transcript and Clerk's Record in the District Court During Preparation of the Briefs.

In all cases, as authorized by FRAP 11(c), both the transcript and the clerk's record shall remain in the custoday of the district court for use by the parties in preparing their briefs.

CIRCUIT RULE 11-4

RETENTION OF CLERK'S RECORD IN THE DISTRICT COURT IN CIVIL CASES WHERE EXCEPTS OF RECORD ARE FILED: RETENTION OF PHYSICAL EXHIBITS IN THE DISTRICT COURT: TRANSMITTAL OF REPORTER'S TRANSCRIPT; TRANSMITTAL OF CLERK'S RECORD UPON REQUEST.

11.4.1 Retention Of Clerk's Record In the District Court.

Except as noted below, in all civil

cases where excerpts of record are to be filed with the Court of Appeals pursuant to Circuit Rule 30-1, the entire clerk's record shall be retained in the district court unless requested by the Court of Appeals. This Provision shall not apply to Tax CourtCases or to cases involving review of Social Security Administration determinations of eligibility for disability insurance benefits. In appeals from the Bankruptcy Appellate Panel, records will be treated in the same fashion as records on appeal in other civil cases arising from the district court.

CIRCUIT RULE 27-7

With the approval of the Court, the Chief Judge may delegate to the clerk or a designated deputy clerk authority to decide unopposed motions that are subject to disposition by a single judge and do not dispose of the appeal. The order shall be subject to reconsideration by a judge of the Court if exception is received within 10 days after it is entered.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-7

(1) Motions acted on by Clerk's Office Personnel.

(a) PROCEDURAL MOTIONS. All non-dispositive procedural motions in appeals or proceedings that have not yet been calendared are acted on by clerk's office personnel under the supervision of the duty judge according to guidelines adopted by the court. . . . . Clerk's office

personnel may act on procedural motions whether opposed or unopposed, but if there is any question under the guidelines as to what action should be taken on the motion, it is referred to the duty judge.

Procedural motions that are acted on by clerk's office personnel under the supervision of the duty judge include motions for extension of time to file abrief, motions to consolidate appeals and motions to file a brief exceeding page limits.

(b) ORDERS OF DISMISSAL. The Clerk is authorized to enter orders of dismissal in civil cases where the parties to an appeal or other proceeding have signed and filed with the Clerk an agreement that the proceedings be dismissed, specifying terms as to the payment of costs. (See FRAP 42(b).)

CIRCUIT RULE 30-1

The Excerpts Of Record

Appeals before the Court of Appeals shall be on the original record without requirement of the appendix prescribed by FRAP 30. Excerpts of record, in cases other than petitions for review or enforcement of agency orders, shall be filed as provided below.

30-1.1. FILING OF THE EXCERPTS OF RECORD.

At the time the appellant's brief is filed, the appellant shall file 5 copies of the excerpts of record bound separately from the briefs. The appellant shall serve 1 copy of the excerpts on each of the other parties.

CIRCUIT RULE 31-2

31.2.1. REQUIREMENT OF TIMELY FILING

(a) Parties shall observe the briefing schedule set forth in FRAP 31(a)

unless a briefing schedule is established by an order of the Court of Appeals. . .

CIRCUIT RULE 33-1

CIVIL APPEALS DOCKETING STATEMENT; PRE-BRIEFING CONFERENCE PROGRAM.

Except as provides in this rule, the appellant/petitioner in each civil case shall complete and submiit a Civil Appeals Docketing Statement on the form provided by the court.

In any civil case, the court may direct that a conference be held before a judge or a senior staff member designated as a conference attorney. The procedures governing the prebriefing conference program are available from the Clerk.

(c) MOTIONS FOR CLARIFICATION, RECONSIDERATION OR REHEARING. A motion for clarification, reconsideration or rehearing of an action taken by clerk's office personnel is decided by the duty judge. Opposition to a motion received after action has been taken by clerk's office personnel is treated as a motion for reconsideration. A motion for reconsideration of a prebriefing conference attorney's order is decided by the administrative judge for the unit from which the matter arose.

FEDERAL RULE OF CIVIL PROCEDURE 6(a)

(a) Computation. In computing any perior of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated perior of time begins to run shall not be included. The last day of the so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday . . . . As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

FEDERAL RULE OF CIVIL PRO. 54(b)

(b) Judgment Upon Multiple Claims
Or Involving Multiple Claims
Or Multiple Parties

When more than one claim for relief is presented in action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may directy the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to

any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Supreme Court, U.S.
FILED
APR 3 1992
OFFICE OF THE CLERK

(2)

No. 91-1445

In The

Supreme Court of the United States

October Term, 1991

JANINE ADAMICK, JOSEPH ADAMICK, and THE ESTATE OF KATHLEEN JO PRICE, Deceased,

Petitioners,

vs.

AMEX, INC., formerly known as FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California Insurance Company, NEVADA FEDERAL CREDIT UNION, UNITED FIDELITY INSURANCE COMPANY, a Texas Insurance Corporation, BENEFIT CONSULTANTS, INC., a California Corporation, and EQUIFAX SERVICES, INC., a Georgia Corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The only question which is properly before this Court is whether the Ninth Circuit Court of Appeals abused its discretion in dismissing the Petitioners' appeal for failure to prosecute.

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No. 91-1445

In The

Supreme Court of the United States

October Term, 1991

JANINE ADAMICK, JOSEPH ADAMICK, and THE ESTATE OF KATHLEEN JO PRICE, Deceased,

Petitioners,

vs.

AMEX, INC., formerly known as FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California Insurance Company, NEVADA FEDERAL CREDIT UNION, UNITED FIDELITY INSURANCE COMPANY, a Texas Insurance Corporation, BENEFIT CONSULTANTS, INC., a California Corporation, and EQUIFAX SERVICES, INC., a Georgia Corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent Amex, Inc. respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This petition was filed on March 2, 1992 and received by Respondents on March 4, 1992.

STATEMENT OF THE CASE

This petition is the result of the dismissal of an appeal which was before the Ninth Circuit Court of Appeals. Petitioners filed two, separate appeals with the Ninth Circuit Court of Appeals, each of which arose from the same action in the United States District Court, District of Nevada. This petition relates to only one of those appeals. However, because petitioners refer to both appeals in their petition, it is necessary to fully summarize the procedural history of both appeals in order to clarify for the Court the issues involved.

The District Court action involved a dispute between a number of insurance companies (including Amex, f/k/a Fireman's Fund American Life Insurance) and an insured relating to the disbursement of various insurance policy benefits. The action proved to be a prolonged affair. In an attempt to resolve all issues surrounding the case without further litigation, Amex submitted $51,000 to the District Court "as a show of good faith" on June 13, 1990. In submitting the funds, Amex stated that it

> irrevocably authorizes the Court to disburse the $51,000 to Janine Adamick, Petitioners, et al, conditioned upon their abandonment of further proceedings in this matter. In exchange therefor, Amex shall abandon its claim for its reimbursement of attorney fees which, to date, are close to $50,000.

Appendix at 3.[1]

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[1] Because a number of the orders and opinions contained in Petitioners' appendix were not properly reproduced and do not represent the actual content of those orders and opinions, Amex will include a full appendix with its opposition.

This effort at settlement was unsuccessful, and the case proceeded to trial. On November 26, 1990, the United States District Court, District of Nevada entered the Judgment and Findings of Fact and Conclusions of Law pertaining to this action. Appendix at 5-24. On December 12, 1990, Petitioners filed a motion to amend and vacate that judgment and for additional findings of fact and conclusions of law. This motion was denied pursuant to an order issued by the District Court on January 22, 1991. Appendix at 25-26.

On March 25, 1991, Petitioners filed a notice of appeal with the District Court. This was an appeal of the final judgment issued by the District Court on November 26, 1991. This appeal will now be referred to as the "first appeal."

On April 19, 1991, the Ninth Circuit Court of Appeals issued a Time Schedule Order designating deadlines for the performance of ministerial tasks relating to this appeal. Appendix at 27-28. Petitioners failed to meet any of the deadlines included in the Time Schedule Order, and on May 18, 1991, Amex filed a motion to dismiss the appeal based upon this failure to adhere to the Time Schedule Order. In response to this motion to dismiss, the Court of Appeals entered an order on June 3, 1991 which denied the motion but provided the following:

> Appellant shall take all steps necessary to ensure that the certificate of record is filed by June 25, 1991. The opening brief is due July 31, 1991 * * * No requests for extensions of time will be granted absent a showing of extraordinary circumstances. *Failure to comply with the orders of*

> *this court within the times set out will result in the dismissal of this appeal for failure to prosecute.* [citations omitted, emphasis added.]

Appendix at 31.

Petitioners completely ignored this schedule, and on August 12, 1991, Amex filed a motion to dismiss this appeal with prejudice due to Petitioners' repeated failure to prosecute. On August 22, 1991, the Ninth Circuit granted that motion to dismiss. Appendix at 32-33.

However, this does not fully summarize the appellate proceedings surrounding this action, as a second appeal also arose from the action in the District Court. On May 16, 1991, Petitioners filed a second notice of appeal relating to this action. This appeal concerned the $51,000 which Amex had voluntarily deposited with the court. The Judgment and Findings of Fact and Conclusions of Law issued by the District Court did not order the return of the voluntarily deposited funds to Amex. As a result, on December 10, 1990, Amex petitioned the District Court for return of the funds deposited. On January 28, 1991 the District Court granted Amex's motion and ordered the deposited funds returned. Appendix at 34-35.

Petitioners motioned the District Court to reconsider its order releasing the funds. On April 17, 1991, Petitioners' motion to reconsider was denied by the District Court. Appendix at 36. On May 16, 1991, petitioners filed the second notice of appeal. This second appeal related only to the district court's postjudgment order returning the voluntarily submitted $51,000 to Amex.

On July 9, 1991, Petitioners moved that these two appeals be consolidated. On July 31, 1991, the Ninth

Circuit entered an order denying Petitioners' motion to consolidate and ordering Petitioners to show why the second appeal should not be dismissed due to a lack of an appealable order. Appendix at 37-38. Just prior to the entry of this order, on July 29, 1991, Amex also submitted a motion to dismiss this second appeal based upon the lack of an appealable order.

Subsequently, Petitioners also filed papers with the Court which stated that the appeal should be dismissed due to the lack of an appealable order, providing some confusion as to why the second appeal had been filed in the first place. Because all parties were in agreement that it did not rise from an appealable order, the Ninth Circuit dismissed the second appeal on August 22, 1991.[2] Appendix at 39.

Unfortunately, this still does not fully summarize the proceedings which occurred below. On September 2, 1991, Petitioners filed with the Court of Appeals a motion for reconsideration of the order granting dismissal of the appeal. In this motion for reconsideration, Petitioners referred to both appeals, providing a muddled document and leaving a very unclear picture of what Petitioners were asking the Ninth Circuit to reconsider. This motion was denied by the Court of Appeals on November 1, 1991, as the Court reaffirmed each of its prior orders. Appendix at 40-41. Petitioners' Petition for Writ of Certiorari followed.

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[2] This was also the date of the dismissal of the first appeal.

SUMMARY OF ARGUMENT

Ninth Circuit Rule 42-1 provides that when an appellant fails to file a timely brief or otherwise comply with rules requiring the processing of an appeal, an order may be entered dismissing the appeal. Petitioner repeatedly failed to comply with the rules relating to the processing of the appeal, and failed to file a brief, timely or otherwise. As such, the Ninth Circuit simply enforced its own stated rule, embodied in an order, when it dismissed Petitioners' appeal.

ARGUMENT

Petitioners argue that the Ninth Circuit has deviated from the usual course of judicial proceedings in dismissing the Petitioners' appeal. This argument is not supported by the above stated facts. The following facts are clear from the record: On April 19, 1991, the Ninth Circuit Court of Appeals issued a Time Schedule Order; Petitioners failed to meet any of the deadlines included in the Time Schedule Order; on May 18, 1991, Amex filed a motion to dismiss the appeal based upon Petitioners' failure to adhere to this Time Schedule Order; on June 3, 1991, the Ninth Circuit entered a revised scheduling order which required Petitioners to file their opening brief by July 31, 1991.

Petitioners did not file their opening brief by July 31, 1991. In fact, Petitioners never filed an opening brief. On August 12, 1991, Amex filed a motion to dismiss this appeal with prejudice due to Petitioners' repeated failure to prosecute. On August 22, 1991, the Ninth Circuit

granted that motion to dismiss. On September 2, 1991, Petitioners filed with the Court of Appeals a motion for reconsideration of the order granting dismissal. This motion was denied by the Court of Appeals on November 1, 1991.

Petitioners were provided with every reasonable opportunity to process their appeal. After Petitioners failed to adhere to the original Time Schedule Order, the Ninth Circuit could have dismissed the appeal. Ninth Circuit Rule 42-1 allows dismissal at any point for failure to adhere to the rules concerning the processing of the appeal.

Rather than dismissing the appeal at that point, the Ninth Circuit displayed extreme leniency and provided Petitioners with a revised scheduling order and a second opportunity to process their appeal. Instead of recognizing their good fortune and appreciating the leniency which the Ninth Circuit displayed, Petitioners again chose to ignore the scheduling order and failed to process their appeal. It is inconceivable how, based upon this record, Petitioners can contend that the Ninth Circuit deprived them of the opportunity to argue their appeal.

It is well established that a court has the authority to dismiss an action for failure to prosecute. This Court previously upheld such a dismissal which occurred at the District Court level in *Link v. Wabash R. Co.*, 370 U.S. 626, 629, 82 S.Ct. 1386, 1388 (1962). The same principles would apply to the dismissal of an appeal by an appellate court, and it was well within the authority of the Ninth Circuit to create and enforce Ninth Circuit Rule 42-1.

Although it would not be openly contended by Petitioners, the crux of their argument is that the Ninth Circuit acted unreasonably in enforcing its own rules. However, as the above stated facts clearly display, the Ninth Circuit was extremely reasonable with Petitioners and afforded them every opportunity to process their appeal. As a result, Petitioners argument is without merit, and the grant of the writ sought would be inappropriate under these circumstances.

CONCLUSION

Respondents respectfully request that the instant petition for writ of certiorari be denied, as the petitioners have brought nothing to the attention of the Court which would indicate that the Ninth Circuit deviated from the accepted standard of judicial conduct in dismissing the Petitioners' appeal for failure to prosecute.

Respectfully submitted,

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Attorneys for AMEX (Formerly FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, Plaintiff, vs. JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE, Defendants.	CV-S-85-146 HDM (Base File) (Filed June 13, 1990)
JANINE ADAMICK, individually, JOSEPH ADAMICK, individually and ESTATE OF KATHLEEN JO PRICE, by and through its Administratrix JANINE ADAMICK, Plaintiffs, vs.	CV-S-86-306 HDM

NEVADA FEDERAL CREDIT UNION, fka NELLIS FEDERAL CREDIT UNION, and its subsidiaries, FIREMAN'S FUND AMERICAN LIFE INSURANCE, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a Texas insurance company BENEFIT CONSULTANTS, INC., a California corporation, EQUIFAX SERVICES, INC., a Georgia corporation, Defendants.	AMEX'S STATEMENT TO THE COURT CONCERNING SUBSEQUENT PROCEEDINGS HEREIN

With the medical release in hand which the Court orders be provided to Amex at the end of the trial in this matter, Amex has been unable to locate any additional medical records above and beyond the few scant documents it was earlier able to procure by virtue of medical releases given under Magistrate Atkins authority in proceedings before Her Honor in October of 1988. The fruits of that records search were introduced in bulk before the Court as a trial exhibit.

Because of the failure of the decedent's survivors to fulfill the insurance contract's condition precedent within a reasonable time, the Adamicks have been successful in ensuring that Amex has been unable to secure a single medical record germane to the issue of whether the death of Kathleen Jo Price was by accident or was intentional.

At the conclusion of the trial herein, the Court did not pronounce judgment on Amex's cause of action (asserted in its Second Amended Complaint filed in June of 1988) seeking a declaration that the failure to timely

fulfill the insurance certificate's condition precedent to execute the medical release and thus cooperate vitiated the obligation to pay.

What the subsequent proceedings have amply demonstrated is that the tardy fulfillment of the condition precedent in this age of scheduled records destruction is the equivalent of the failure to fulfill the condition precedent at all.

Herewith, Amex files with the Court a proposed form of Findings of Fact and Conclusions of Law which incorporate such a finding, Conclusion of Law and Judgment thereunder.

It is Amex's wish to have this matter concluded without an appeal. However, as a show of good faith, Amex conditionally has filed its tender of the proceeds of the certificate, without interest, which may be distributed and disbursed appropriately by the Court In the event that the Court can secure a commitment from Mrs. Adamick not to appeal any judgment entered by the Court herein, abandon proceedings to recover interest on the $51,000 sum, and abandon their claim to attorney fees, Amex irrevocably authorizes the Court to disburse the $51,000 to Janine Adamick, et al conditioned upon their abandonment of further proceedings in this matter. In exchange therefor, Amex shall abandon its claim for its reimbursement of attorney fees which, to date, are close to $50,000.

DATED this 13 day of June, 1990.

Respectfully submitted,

LEFEBVRE, BARRON &
OAKES, CHTD.

BY: /s/ Alan J. Lefebvre
ALAN J. LEFEBVRE
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301 East Clark
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Attorneys for AMEX
f/k/a FIREMAN'S FUND
AMERICAN LIFE
INSURANCE COMPANY

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of June, 1990, I served a copy of the foregoing AMEX'S STATEMENT TO THE COURT CONCERNING SUBSEQUENT PROCEEDINGS HEREIN, by depositing same in the United States mails, postage prepaid, addressed as follows:

Janice M. Hayes, Esq.
3391 S. El Camino Road
Las Vegas, Nevada 89102

/s/ Catherine Harris
An Employee of
LEFEBVRE, BARRON &
OAKES, CHTD.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, now known as AMEX LIFE ASSURANCE COMPANY, Plaintiff, vs. JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE, Defendants.	CV-S-85-146 HDM (Base File) (Nov. 26, 1990)
JANINE ADAMICK, individually, JOSEPH ADAMICK, individually and ESTATE OF KATHLEEN JO PRICE, by and through its Administratrix JANINE ADAMICK, Plaintiffs, vs. NEVADA FEDERAL CREDIT UNION, fka NELLIS FEDERAL CREDIT UNION, and its subsidiaries, FIREMAN'S FUND AMERICAN LIFE INSURANCE, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a Texas insurance company BENEFIT CONSULTANTS, INC., a California corporation, EQUIFAX SERVICES, INC., a Georgia corporation Defendants.	CV-S-86-306 HDM FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 27th and 28th, 1990, this case was tried to the Court on the Second Amended Complaint of AMEX, formerly known as FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY v. JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE in Case No. CV-S-85-146 HDM and on its consolidated companion, CV-S-86-306 HDM styled as JANINE ADAMICK, individually, JOSEPH ADAMICK, individually, and ESTATE OF KATHLEEN JO PRICE, by and through its Administratrix, JANINE ADAMICK vs. NEVADA FEDERAL CREDIT UNION, fka NELLIS FEDERAL CREDIT UNION, and its subsidiaries, FIREMAN'S FUND AMERICAN LIFE INSURANCE, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a Texas insurance company, BENEFIT CONSULTANTS, INC., a California corporation, EQUIFAX SERVICES, INC., a Georgia corporation. Throughout these proceedings, AMEX, Life Assurance Company f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY ("Post, AMEX") and BENEFIT CONSULTANTS, INC. have been represented by ALAN J. LEFEBVRE, previously of the law firm of Beckley, Singleton, DeLanoy, Jemison & List, Chartered and presently of Lefebvre, Barron & Oakes, Chartered. JANINE ADAMICK, JOSEPH ADAMICK and the ESTATE OF KATHLEEN JO PRICE have been represented by Janice M. Hayes, Esq. of the law firm of Janice M. Hayes, Chartered, P.C.

At the conclusion of the trial on March 28, 1990, this Court ordered that AMEX, armed with the form of medical release it had earlier sought, attempt to determine

whether information was still available, after March 28, 1990, which, if released to AMEX (pursuant to the terms of the medical release), would enable AMEX to determine whether the claim of Janine Adamick, Joseph Adamick, and the Estate of Kathleen Jo Price, could be processed. The Court ordered that AMEX report back to the Court, which AMEX did in a filing styled as "Notice of Rejection of Claim of Janine M. Adamick et al. Because of Her Failure to Fulfill the Insurance Contract's Condition Precedent Within a Reasonable Time."

Having heard and reviewed the evidence presented at trial, the post-trial proceedings and having considered all the arguments advanced in these proceedings, the Court hereby finds the following facts specifically and separately and states its Conclusions of Fact as follows:

FINDINGS OF FACT

1. On August 1, 1982, AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, issued a Group Accident Policy, bearing the No. DVA 525 3197 to the Nellis Federal Credit Union and its members.

2. At all times pertinent hereto, KATHLEEN JO PRICE, was a member of the Nellis Federal Credit Union, by virtue of the fact that her sponsor, her mother, was an employee of the United States Postal Department.

3. On or about February 1, 1984, KATHLEEN JO PRICE became an insured person under the Master Policy DVA 525 3197 by virtue of her payment of a premium and the issuance by the Nellis Federal Credit Union of Certificate No. 9953801.

4. The Court finds that KATHLEEN JO PRICE died on July 19, 1984.

5. The Court finds that the coroner of the County of Clark issued an Autopsy Report.

6. The Court finds that an investigation by the Metropolitan Police Department was conducted by L. J. Hazel and he noted in his report in haec verba:

> DECEDENT: KATHLEEN JO PRICE M.S.W.D. DOB 3-2-52
>
> Age: 32 Sex: Female Race: White Tel.No. 871-5135
>
> Residence Address:
> 3391 South El Camino Road,
> Las Vegas, Nevada 89102
>
> Height: 62" Weight: 88 Hair: Brown Eyes: Brown
>
> Tatoos:
>
> Other identifying features:
>
> Rigor Mortis: None
>
> Livor Mortis: Slight independent Area
>
> Clothing: White shirt, white jeans.
>
> Trauma: None Visible.
>
> Drugs & Medications:
> Phenegrin w/Codeine, Kuzyme,
> Wygesic, Percodan, Prednisone,
> Mysclin, Darvocet N100.
>
> Occupation: Unemployed S.S. # 530-44- (not legible from report)

Reported by: LVMPD

Date & Time reported:

Location of Body: 3391 S. El Camino Road

Type of Death: Apparent Natural 7

Violent ___ At work ___ Not at Work: xx

CIRCUM-STANCES	DATE	TIME	NAME & ADDRESS
Found Dead By	7-19	12:30 AM	Joseph Adamick 3391 S. El Camino Rd
Last Seen By	7-18	9:30 PM	Janine Adamick 3391 S. El Camino Rd
Pronounced	7-19	1:25 AM	L. J. Hazel
Dead by	7-19	1:25 AM	L. J. Hazel
Body Viewed by			
Identified by	7-19	2:00 AM	Joseph Adamick

Witness #1

Witness #2

Law Enforcement Agency: LVMPD Officer: Kuehl.

Property Receipt: 18419 In Custody of: Mother

Custody of Body: Removed by Mortuary Vehicle to CCCME

Driver: Given Assisted by: Amos

Requested by: Duty – Valley View Mortuary

Death Notification: Next of Kin: Joseph and Janine Adamick, Parents

Address: 3391 South El Camino Road, Las Vegas, NV

Telephone No. 871-5135

Notification made by: Present at death.

Date: 7-19-84 Time: 12:30 AM

NARRATIVE SUMMARY Case No. 1055-84
7-19-84 Age 32

Received a call from Las Vegas Metropolitan Police Department Dispatch 7-19-84, 12:56 A.M., to respond to a death at 3391 So. El Camino Road.

Upon arrival, viewed decedent sitting in a slouched position on a couch with her legs crossed and one foot on a coffee table. No vital signs present. Pronounced dead 1:25 A.M., 7-19-84.

Decedent was last seen by her mother at approximately 9:30 P.M., 7-18-84, when she left for work, decedent was watching television. Father awoke at approximately 12:30 A.M., 7-19-84, and went into den and attempted to arouse decedent, was unsuccessful and called paramedics. Upon their arrival, no effort to resuscitate her was made.

Past medical history diagnosed lupis erythremia, anorexia nervosa, per father. She also had a problem with taking too many drugs. The one prescription of Wygesic she got today and it appears she took 17 of these plus

unknown other medications. She was in good spirits and had not verbalized an intent of taking her own life. Was only plagued with persistent headaches.

Body removed by Palm Mortuary to CCCME. Body processed, placed in locker #1.

Property receipt #18419 completed, released to mother.

7. The Court finds that approximately two (2) months lapsed after the decedent's death before the decedent's survivors, the Plaintiffs in CV-S-86-306 HDM filed a claim, seeking the benefits of the proceeds of the Certificate of Insurance 9953801, issued to KATHLEEN JO PRICE, naming JANINE ADAMICK as beneficiary in the amount of $51,000.

8. Thereafter, pursuant to the terms of Master Policy DVA 525 3197 and the Certificate of Insurance issued to KATHLEEN JO PRICE as the insured person and JANINE ADAMICK as the beneficiary, FIREMAN'S FUND within the time prescribed, provided forms of proof of loss to the claimants that are usually issued by it in such cases to the beneficiary.

9. Thereafter AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY transmitted a form of proof of loss within the time prescribed by the certificate and the master policy to the decedent's survivors including the beneficiary of the insurance certificate.

10. The Court finds that while completing a portion of the proof of loss, JANINE ADAMICK refused for almost six years to execute a form of medical release,

until ordered to do so during the trial herein, (to accompany the proof of loss and made an integral part thereof) authorizing the release of medical records to AMEX, after first being asked to do so by AMEX in 1984.

11. The Court finds that on four occasions prior to the initiation of litigation in this matter, JANINE ADAMICK as the beneficiary of the insurance certificate and as Administratrix of her daughter's estate personally refused, through her counsel, (whom she authorized to act for her and whose acts she has ratified), to execute the forms of proof of loss in compliance with the requirements of the certificate of insurance from which and through which she claims her right to the proceeds of Certificate of Insurance 9953801.

12. JANINE ADAMICK, the decedent's mother and beneficiary of the Certificate of Insurance 9953801, disobeyed this Court's Orders on a number of occasions, which directed that the medical information sought by AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY be given to Amex. These acts of disobedience of lawful court orders are evidenced by the following filings or proceedings before this Court of which this Court takes judicial notice:

DATE	
02/17/87	FIREMAN'S FUND STATEMENT TO THE COURT CONCERNING DOCUMENTS IT SEEKS IN CV-S-85-146 HDM PURSUANT TO THE COURT'S ORDER OF 2/5/87.
04/27/87	DISOBEDIENCE OF JUDGE PRO'S ORDER
06/09/87	APPLICATION FOR CONTEMPT

10/22/87	MOTION FOR CLARIFICATION OF THE COURT'S ORDER
01/06/89	AMEX'S STATUS REPORT TO THE COURT

13. The Court finds that JANINE M. ADAMICK personally declined to execute the proof of loss supplied by AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, and has ratified her counsel's acts in defying the requirements of this Court and AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY in seeking the documents pursuant to the proof of loss to allow AMEX to complete its investigation and determine whether the proceeds of the certificate ought to be paid to the decedent's beneficiary and/or her survivors.

14. The Court finds, pursuant to the testimony presented to it and the terms of Master Policy No. DVA 525 3197 (and Certificate of Insurance No. 9953801, issued to KATHLEEN JO PRICE) that it was a condition precedent to payment, that a "proof of loss" to claim payment, as is ordinarily required by AMEX, included the execution of a form by the decedent's beneficiary and/or survivors allowing the release of medical information from all physicians who had treated the decedent, to allow the company to conduct an investigation into the cause of death.

15. The Court finds the condition precedent to payment, the presentation of a proof of loss and execution of a medical release almost six years after the fact does not substantially or timely fulfill the insurance contract's condition precedent; accordingly, in the hopes that some evidence still existed to allow FIREMAN'S FUND to act

on the claim as presented, this Court at the conclusion of the taking of evidence in this matter, ordered that JANINE ADAMICK execute the form of release as presented to her. The Court finds that such a release was executed and provided to counsel for AMEX in April of 1990, after the conclusion of trial herein. On March 28, 1990, the Court ordered that AMEX utilize the release, which was provided, to determine whether it could process this claim based upon information available in 1990 and make a determination of whether it in fact has an obligation to pay the $51,000 claim made by JANINE ADAMICK ET AL.

16. In post-trial proceedings, AMEX has reported to the Court, in its filing dated June 13, 1990 styled as "Notice of Rejection of Claim of Janine Adamick, et al Because of Her Failure to Fulfill the Insurance Contracts Condition Precedent Within a Reasonable Time" that it is unable to process the claim because of non-cooperation by JANINE ADAMICK, JOSEPH M. ADAMICK and the ESTATE OF KATHLEEN JO PRICE. The Court takes judicial notice herein of the filing by AMEX, styled as "Notice of Lodging of Records Procured as a Result of the Release Obtained Pursuant to the Court's Order at the End of Trial of the Matter" as filed on June 13, 1990, which indicates that no medical records are now available upon which AMEX can intelligently act upon in making a determination on the merits of the claim.

17. The Court finds that AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, issued one and only one Certificate, naming KATHLEEN JO PRICE as an insured, the same being Certificate No.

9953801 dated February 1, 1984 in the amount of $51,000, naming JANINE ADAMICK as beneficiary.

18. Pursuant to 28 U.S.C. § 1927, the Court finds that JANICE M. HAYES, as attorney of record, together with her clients, the ESTATE OF KATHLEEN JO PRICE, JANINE M. ADAMICK and JOSEPH ADAMICK have multiplied the proceedings in this case unreasonably and vexatiously and they are required by the Court to personally satisfy attorneys' fees and costs reasonably incurred by AMEX during the conduct of this matter, in the amount of $9,000.

19. The Court finds as a matter of fact that in seeking the execution of the proof of loss, and throughout its conduct in attempting to process the claims of the Adamicks prior to and through the conclusion of this litigation, AMEX has acted in good faith.

20. The Court finds that AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, has acted in accordance with all applicable laws and regulations enacted by the legislature of the State of Nevada and promulgated by the Insurance Commissioner of the State of Nevada governing insurers such as AMEX herein and that AMEX has not breached any term or condition of its Master Policy Number DVA-525-3197 and in so conducting its investigation of the claim made by the survivors of Kathleen Jo Price and that AMEX has no breached any implied duty of good faith and fair dealing owing to the decedent's survivors or any other person in attempting to secure information necessary to investigate and evaluate the claim made by the decedent's survivor resulting from the loss of life of Kathleen Jo Price.

21. The Court herein, upon proceedings before it and the Judgment which will be entered hereon, makes no finding, binding on any other court, with regard to the ultimate issue presented herein, to wit, whether AMEX, formerly known as Fireman's Fund Insurance Policy, has any liability to JANINE M. ADAMICK, the ESTATE OF KATHLEEN JO PRICE or JOSEPH ADAMICK to pay pursuant to insurance certificate DVA-525-3197. The Court specifically defers, to the Eighth Judicial District Court in a case styled as *Janine and Joseph Adamick, Plaintiffs v. Fireman's Fund American Life Insurance Company, Nevada Federal Credit Union, fka Nellis Federal Credit Union, United Fidelity Life Insurance Company, Benefit Consultants, Inc., Equifax Services, Inc.*, Case No. A247534, pending before Department IV thereof, the Honorable Earle W. White, Judge of the Eighth Judicial District Court, to make that determination. That action, was originally filed before the Eighth Judicial District Court and was assigned the Case No. A247534. That action was later removed to the United States District Court and assigned the number in this Court of CV-S-86-555-HDM. Pursuant to an Order of Remand, that matter was remanded to Judge White with a recommendation from this Court, that Judge White entered an order staying proceedings, of which this court takes judicial notice, the same being filed in that Court on April 15, 1987.

22. This Court finds that all of the matters litigated during the course of the trial in these consolidated cases, to wit, CV-S-85-146-HDM and CV-S-86-306-HDM are identical to those matters currently pending before Judge White in Case No. A247534 and the Findings of Fact and Conclusions of Law and Judgment herewith entered in

this matter have *res judicata* effects upon the parties, as remanded to Judge White in Case No. A247534 on all issues except and save the following: Whether AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY has an obligation, in light of all the circumstances detailed herein, to pay the claim of JOSEPH ADAMICK, JANINE M ADAMICK and the ESTATE OF KATHLEEN JO PRICE. The Court specifically finds that if the parties wish to litigate that ultimate issue before Judge White, they are free to do so, with the admonition that such litigation be circumscribed by the *res judicata* affects of these Findings of Fact, Conclusions and Law and the Judgment which will be entered thereon. The Court specifically finds that AMEX, formerly known as FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY would be free in such litigation on the issue of ultimate liability to pay, to assert and litigate before Judge White, its contention that its obligation to pay has been vitiated by virtue of specific acts of non-cooperation of JOSEPH ADAMICK, JANINE M ADAMICK and the ESTATE OF KATHLEEN JO PRICE as embodied in paragraphs 31, 32 and 33 of their Second Amended Complaint filed before this Court on July 5, 1989 and as circumscribed by the pretrial order in these consolidated cases. In relation to matters encompassed within the ambit of the cases of action asserted in Case No. A247534, the Court finds and concludes that the *res judicata* and collateral estoppel effects delineated herein are not a bar to AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY to assert their defenses on that issue of ultimate liability, or wit, lack of cooperation and the fulfillment of a condition precedent

to payment, the timeliness of providing information requested in the processing of the claim. Both of those matters, are open as defenses and may be asserted in Case No. A247534 if the parties wish to proceed before Judge White.

23. The Court finds and concludes that there is no factual or legal obstacle to the parties proceeding before Judge White upon timely application, in the Eighth Judicial District Court, to lift the Order Staying Proceedings, filed April 15, 1987.

24. The Court, however, specifically finds and determines that all other matters, which were or could have been litigated between the parties in CV-S-85-146-HDM and CV-S-86-306-HDM and in Case No. A247534 (formerly before remand, Case No. CV-S-86-555-HDM) have been finally and fully litigated between the parties and thus *res judicata* and collateral estoppel principles apply to bar relitigation of these matters determined by the Court upon a full trial on the merits and such Findings of Fact and Conclusions of Law and the Judgment entered thereon may only be challenged by an appeal of this Court's determinations herein as embodied in its Findings of Fact and Conclusions of Law and Judgment. Those matters have been finally and fully litigated and relief from them may be sought only before the Ninth Circuit Court of Appeal except as to those matters specifically outlined herein which may be subject to further proceedings before the Eighth Judicial District Court, in Case No. A247534.

25. The Court finds and determines that as a matter of its proceedings herein, that although AMEX, f/k/a

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY in Case No. A247534 did not answer in Case No. A247534 but removed it, pursuant to a duly filed petition of removal, (for consolidation with these cases), it is free, upon the issuance of an order lifting the stay of proceedings in Case No. A247534 to answer that Complaint and assert via the mechanism of affirmative defenses or as an affirmative counterclaim, the defenses offered herein to the claim of ultimate liability, to wit, that untimely providing a form of medical release as originally requested, vitiates the obligation to pay, as outlined in paragraphs 31, 32 and 33 set forth in Fireman's Fund Second Amended Complaint for Declaratory Relief filed in these consolidated acts on July 5, 1989, and that AMEX, formerly known as FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, is free to litigate as defenses, its contentions of lack of fulfillment of a condition precedent and lack of cooperation as a defenses vitiated its ultimate obligation to pay under the certificate of insurance. The *res judicata* effects of the findings do not operate to bar the litigation of those defenses as such as an affirmative counterclaim.

26. The Court finds as a matter of fact that this Court, has litigated or otherwise disposed of all of the rights of JOSEPH ADAMICK, JANINE M ADAMICK and the ESTATE OF KATHLEEN JO PRICE as against all the other parties to Case No. A247534, (FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, now known as AMEX) and that other proceedings before this Court, have disposed of the plaintiff's claims against all the other parties named as defendants in Case No. A247534.

27. The Court finds that no evidence whatsoever was presented to establish any liability of BENEFIT CONSULTANTS, INC., and accordingly, BENEFIT CONSULTANTS, INC., is dismissed herein as a party, because of a complete failure of proof.

28. During the course of the proceedings herein, the Estate of Kathleen Jo Price, Joseph and Janine M. Adamick, through their counsel, have asserted sundry claims against AMEX upon other various common law, statutory tort, contract, misrepresentation, conspiracy, and hybrid theories which are evidenced in the pleadings filed on behalf of those parties in these consolidated cases. The Court specifically finds that all other causes of action, regardless of their label, have been fully litigated between the parties to this action and there has been a complete failure of proof upon each of those theories, their hybrids and any permutation or combination of them.

29. If any of the foregoing Conclusions of Fact should be more properly stated as Conclusions of Law, they shall be deemed so stated.

CONCLUSIONS OF LAW

1. The insurance contract required as a condition precedent to payment, that the claimant complete a proof of loss in a form as is usually furnished by the Company for filing proofs of loss, which included the execution of a general medical release, thereby allowing the insurer access to the decedent's medical records, within a reasonable time.

2. The Court finds as a matter of law, pursuant to the terms of the Certificate itself and the testimony adduced, that only one Certificate was issued to the decedent pursuant to Master Policy No. DVA 525-3197.

3. The Court finds as a matter of law that in seeking the execution of the proof of loss, and throughout its conduct in attempting to process the claims of the Adamicks prior to and through the conclusion of this litigation, AMEX has acted in good faith.

4. The Court finds that as a matter of law, that AMEX, (formerly known as FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY), has acted in accordance with all applicable laws and regulations enacted by the legislature of the State of Nevada and promulgated by the Insurance Commissioner of the State of Nevada governing insurers such as AMEX herein and that AMEX has not breached any term or condition of its Master Policy Number DVA-525-3197 in conducting its investigation of the claim made by the survivors of Kathleen Jo Price and that AMEX has not breached any implied duty of good faith and fair dealing owing to the decedent's survivors or any other person in attempting to secure information necessary to investigate and evaluate the claim made by the decedent's survivors resulting from the loss of life of Kathleen Jo Price.

5. Based upon a complete failure of proof on the Adamick's contention that the decedent was issued two (2) certificates of insurance, each in the amount of $51,000, the Court determines as a matter of law that AMEX (f/k/a Fireman's Fund American Life Insurance Company) issued one and only one certificate, naming

Kathleen Jo Price as the insured, the same being Certificate No. 9953801, dated February 1, 1984.

6. AMEX, f/k/a FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY is entitled to an award of attorneys' fees, in their favor, in the amount of $9,000; JANINE ADAMICK, JOSEPH ADAMICK, the ESTATE OF KATHLEEN JO PRICE, and JANICE M. HAYES, their counsel, are all jointly and severally liable for payment of those attorneys' fees.

7. If any of the foregoing Conclusions of Law should be more properly stated as Findings of Fact, they shall be deemed so stated.

DATED this 20th day of November, 1990.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am an employee of Lefebvre, Barren & Oakes and that on this date, I deposited in the U.S. Mail, with first-class postage affixed thereto, a copy of the foregoing Appellee/Plaintiff/Counterdefendant Fireman's Fund American Life Insurance Company's Motion to Dismiss Addressed to:

Janice M. Hayes, Esq.
3391 S. El Camino Road
Las Vegas, NV 89012

Von Heinz
Vargas & Bartlett
3800 Howard Hughes Parkway
7th Floor
Las Vegas, NV 89109

Gregory T. Hafen
Hafen & Mayor
525 S. Ninth Street
Las Vegas, NV 89101

Floyd T. Hale
Edwards Hunt Hale & Hanson
415 S. Sixth Street
Suite 300
Las Vegas, NV 89101

Charles M. Damus
624 S. Sixth Street
Las Vegas, NV 89101

Dated this 16th day of May, 1991.

By /s/ Judy Estrada

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am an employee of Lefebvre, Barren & Oakes and that on this date, I deposited in the U.S. Mail, with first-class postage affixed thereto, a copy of the foregoing Plaintiff/Appellee Fireman's Fund American Life Insurance Company's Motion to Dismiss

Addressed to:

Janice M. Hayes, Esq.
3391 S. El Camino Road
Las Vegas, NV 89012

Von Heinz
Vargas & Bartlett
3800 Howard Hughes Parkway
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Las Vegas, NV 89109

Gregory T. Hafen
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Floyd T. Hale
Edwards Hunt Hale & Hanson
415 S. Sixth Street
Suite 300
Las Vegas, NV 89101

Charles M. Damus
624 S. Sixth Street
Las Vegas, NV 89101

Dated this 9th day of August, 1991.

By /s/ Judy Estrada

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY,

Plaintiff,

vs.

JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE,

Defendants.

_____/

CV-S-85-146-HDM
(Base File)

ORDER

(Filed
Jan. 25, 1991)

JANINE ADAMICK, individually, JOSEPH ADAMICK, individually and ESTATE OF KATHLEEN JO PRICE, by and through its Administratrix JANINE ADAMICK,

Plaintiffs,

vs.

NEVADA FEDERAL CREDIT UNION, f/k/a NELLIS FEDERAL CREDIT UNION, and its subsidiaries, FIREMAN'S FUND AMERICAN LIFE INSURANCE, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a Texas insurance company, BENEFIT CONSULTANTS, INC., a California corporation, EQUIFAX SERVICES, INC., a Georgia corporation,

Defendants.

_____/

CV-S-86-306-HDM

The motions of Janine Adamick and the Estate of Kathleen Jo Price to amend and vacate the order and judgment of November 26, 1990 and for entry of additional findings and conclusions and for new trial (#272) are DENIED.

It is so ORDERED.

DATED this 22nd day of January, 1991.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket Number: 91-15575
Lower Court Docket Number: CV-85-0146-HDM

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., nka Amex

Plaintiff-Appellee

v.

(Filed Apr. 19, 1991)

JANINE ADAMICK, individually; ESTATE OF KATHLEEN JO PRICE, deceased

Defendants-Appellants

TIME SCHEDULE ORDER

The parties shall meet the following time schedule:

→ Appellant/petitioner shall file the civil appeals docketing statement (CADS), pursuant to Circuit Rule 33-1; 5/3/91

→ Appellant/petitioner shall notify appellee/respondent of transcripts to be ordered, pursuant to Circuit Rule 10-3.1(a); 4/4/91

→ Appellee/respondent shall notify appellant/petitioner of any additional transcripts needed, pursuant to Circuit Rule 10-3.1(b); 4/15/91

→ Appellant/petitioner shall file transcript order form with the district court and make payment arrangements

with court reporter, pursuant to Circuit Rule 10-3.1; 4/24/91

→ Court reporter shall file transcript in the district court, pursuant to FRAP 11(b) and Circuit Rule 11-1.1; 5/28/91

→ Appellant/petitioner's opening brief and excerpts of record shali be served and filed, pursuant to FRAP 31(a) and Circuit Rule 31-2; 7/11/91

→ The brief of appellee/respondent shall be filed and served, pursuant to FRAP 31(a) and Circuit Rule 31-2; 8/12/91

→ The reply brief, if any, of appellant/petitioner shall be filed and served within fourteen days of service of the appellee/respondent's brief, pursuant to FRAP 31(a) and Circuit Rule 31-2.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court
/s/ Ed Manuel
By: Ed Manuel
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., et al.,	)	No. 91-15575
	)	DC# CV-S-85-146-HDM
	)	Nevada (Las Vegas)
Plaintiffs-Appellees,	)	ORDER
vs.	)	
JANINE ADAMICK, et al.,	)	(Filed June 3, 1991)
Defendants-Appellants.	)	

Before: TANG, REINHARDT and THOMPSON, Circuit Judges

The district court granted United Fidelity Life Insurance Co.'s motion to dismiss on June 11, 1987, certified its order as final pursuant to Fed. R. Civ. P. 54(b) and entered judgment on June 26, 1987. Even allowing for the possibility that timely Fed. R. App. P. 4(a)(4) tolling motions were made, the last possible day for filing a notice of appeal from this judgment was March 7, 1988, by virtue of the district court's granting an extension of time. Appellants failed to file a notice of appeal until March 25, 1991. Accordingly, the motion to dismiss this appeal as to United Fidelity for lack of jurisdiction is granted.

On November 23, 1988, the district court entered final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing the underlying action against defendants Nevada Federal Credit Union and Equifax Services, Inc. No

timely tolling motions were filed. No motion for an extension of time to file the notice of appeal was made. Appellants failed to file a notice of appeal within 30 days of entry of the judgment. Accordingly, the motions to dismiss this appeal as to Equifax Services, Inc. and Nevada Federal Credit Union for lack of jurisdiction are granted. *See* Fed. R. App. P. 4.

This appeal is limited to a review of the district court's judgment entered pursuant to Fed. R. Civ. P. 54(b) in favor of plaintiff/counterdefendant AMEX f/k/a Fireman's Fund American Life Insurance Co., Inc. To the extent that the notice of appeal filed by appellants on March 25, 1991, purports to appeal "from all other adverse rulings" of the district court, the appeal is more than two years out of time and is therefore frivolous. Accordingly, within 14 days of the date of this order, appellants' counsel Janice M. Hayes is hereby ordered to show cause why she should not be sanctioned in the amount of $250.00 for filing a frivolous appeal. Fed. R. App. P. 38. If counsel fails to comply with this order, $250.00 shall be assessed against her personally. Any reply received in compliance with this order shall be referred to the panel that considers this appeal on its merits. Moreover, appellants' counsel is warned that the filing of frivolous, duplicative, delaying motions and pleadings is cause for the imposition of future sanctions.

Appellee Fireman's Fund's motion to dismiss for failure to prosecute is denied. Appellants' motion for an extension of time in which to file the civil appeals docketing statement is denied. The civil appeals docketing statement requirement is waived. This case is released from

the prebriefing conference program. No prebriefing conference will be held.

The briefing schedule established by this court's April 19, 1991 order is vacated. Appellant shall take all steps necessary to ensure that the certificate of record is filed by June 25, 1991. *See* 9th Cir. R. 10.3; Fed. R. App. P. 11. The opening brief is due July 31, 1991; the answering brief is due August 30, 1991; the optional reply brief is due September 16, 1991. No requests for extensions of time will be granted absent a showing of extraordinary circumstances. Failure to comply with the orders of this court within the times set out will result in the dismissal of this appeal for failure to prosecute. *See* 9th Cir. R. 42-1. All motions for reconsideration which relate to the scope of this appeal shall be referred to the panel that considers this case on its merits. No motions for reconsideration which relate to the procedural aspects of this order will be entertained.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., n/k/a Amex, Plaintiff-Appellee, vs. JANINE ADAMICK, individually, et al., Defendants-Appellants, and EQUIFAX SERVICES, INC., Defendant.	No. 91-15575 DC# CV-85-146-HDM Nevada (Las Vegas) ORDER (Filed Aug. 22, 1991)

Before: FLETCHER, LEAVY and T.G. NELSON, Circuit Judges

On June 3, 1991, this court ordered that appellants' brief be filed on July 31, 1991. Appellants were warned that no extensions of time would be granted absent a showing of extraordinary circumstances and that failure to comply with the orders of this court would result in the dismissal of this appeal. On August 2, 1991, this court received a late motion for an extension of time to file the opening brief. *See* 9th Cir. R. 31-2.3(f). This untimely motion fails to show that appellants are entitled to such relief. Moreover, to date, this court has not received an opening brief for this appeal. Accordingly, appellee's

motion to dismiss this appeal for lack of prosecution is granted. All other pending motions are denied as moot.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY,

Plaintiff,

vs.

JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE,

Defendants.

_____/

CV-S-85-146-HDM
(Base File)

ORDER

(Filed
Jan. 28, 1991)

JANINE ADAMICK, individually, JOSEPH ADAMICK, individually and ESTATE OF KATHLEEN JO PRICE, by and through its Administratrix JANINE ADAMICK,

Plaintiffs,

vs.

NEVADA FEDERAL CREDIT UNION, f/k/a NELLIS FEDERAL CREDIT UNION, and its subsidiaries, FIREMAN'S FUND AMERICAN LIFE INSURANCE, a California insurance corporation, UNITED FIDELITY LIFE INSURANCE COMPANY, a Texas insurance company, BENEFIT CONSULTANTS, INC., a California corporation, EQUIFAX SERVICES, INC., a Georgia corporation,

Defendants.

_____/

CV-S-86-306-HDM

The petition of AMEX for the return of the fifty-one thousand dollars ($51,000.00) deposited with the court on June 14, 1990 (#271) is GRANTED. The clerk of the court is directed to remit to AMEX the sum of fifty-one thousand dollars ($51,000.00).

It is so ORDERED.

DATED this 25th day of January, 1991.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY,

Plaintiff,

vs.

JANINE ADAMICK, THE ESTATE OF KATHLEEN JO PRICE,

Defendants.

/

CV-S-85-146-HDM (LRL)
(Base File)

ORDER

(Filed Apr. 17, 1991)

JANINE ADAMICK, et al.,

Plaintiffs,

vs.

NEVADA FEDERAL CREDIT UNION, et al.,

Defendants.

/

CV-S-86-306-HDM (LRL)

The Adamicks' motion for reconsideration (#284) is DENIED.

It is so ORDERED.

Dated this 15th day of April, 1991.

/s/ Howard D. McKibben
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., n/k/a Amex, Plaintiff-Appellee, vs. JANINE ADAMICK, et al., Defendants-Appellants, and EQUIFAX SERVICES, INC., Defendant.	No. 91-15575 DC# CV-85-0146-HDM Nevada (Las Vegas)
FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., n/k/a Amex, Plaintiff/Counter-Defendant/Appellee, vs. JANINE ADAMICK, et al., Defendants/Counter-Plaintiffs/Appellants.	No. 91-15947 DC# CV-86-00306-HDM Nevada (Las Vegas) ORDER (Filed JUL 31 1991)

The motion to consolidate these appeals is denied. Moreover, within 21 days of the entry of this order, appellant shall show cause why no. 91-15947 should not be dismissed for lack of jurisdiction. No. 91-15947 purports to be an appeal from the district court's denial of a motion to reconsider its order authorizing the return of a $51,000.00 bond posted by defendant Amex. This does

not appear to be a final appealable order of the district court.

Failure to comply with this order within the time set out will result in the automatic dismissal of this appeal by the Clerk pursuant to 9th Cir. R. 42-1.

For the Court:

/s/ Molly C. Dwyer
Molly C. Dwyer
Motions Attorney/Deputy Clerk

MA 7/29/91

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., n/k/a Amex, Plaintiff/Counter-Defendant/Appellee, vs. JANINE ADAMICK, et al., Defendants/Counter-Plaintiffs/Appellants.	No. 91-15947 DC# CV-85-00146-HDM Nevada (Las Vegas) ORDER (Filed AUG 22 1991)

Before: FLETCHER, LEAVY, and T.G. NELSON, Circuit Judges

The motion to dismiss this appeal for lack of jurisdiction is granted.

MoCal 8/19/91
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APPENDIX 11

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., nka, Plaintiff-Appellee, vs. JANINE ADAMICK, individually, ESTATE OF KATHLEEN JO PRICE, deceased Defendants-Appellants, and EQUIFAX SERVICES, INC., Defendant.	No. 91-15575 DC# CV-85-0146-HDM Nevada (Las Vegas)
FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., Plaintiff/counter-defendant/Appellee, vs. JANINE ADAMICK, individually, ESTATE OF KATHLEEN JO PRICE, deceased, et al., Defendants/counter-plaintiffs/Appellants.	No. 91-15947 DC# CV-86-00306-HDM Nevada (Las Vegas) ORDER (Filed NOV 01 1991)

Before: FLETCHER, LEAVY, and T.G. NELSON, Circuit Judges

Appellants' motions to reconsider this court's August 22, 1991 orders dismissing Nos. 91-15947 and 91-15575 are denied in their entirety. A copy of the mandate shall issue forthwith. No further filings will be accepted in these closed dockets.

Memo 10/23/91 (MoCal 8/91/md)

Supreme Court, U.S.
FILED
APR 21 1992
OFFICE OF THE CLERK

(3)

No. 91-1445

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

JANINE ADAMICK, JOSEPH ADAMICK, and THE ESTATE OF KATHLEEN JO PRICE, Deceased,

Petitioners,

vs.

AMEX, INC., formerly FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California Insurance Company, NEVADA FEDERAL CREDIT UNION, UNITED FIDELITY Insurance Company, a Texas Insurance corporation, BENEFIT CONSULTANTS, INC. a California corporation, and EQUIFAX SERVICES, INC., a Georgia corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

JANICE M. HAYES, ESQ.
3391 S. El Camino Road
Las Vegas, Nevada 89102-6625
(702) 871-5135
Attorney for Petitioners

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No: 91-1445

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

JANINE ADAMICK, JOSEPH ADAMICK, and THE ESTATE OF KATHLEEN JO PRICE, Deceased,

Petitioners,

vs.

AMEX, INC., formerly FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California Insurance Company, NEVADA FEDERAL CREDIT UNION, UNITED FIDELITY Insurance Company, a Texas Insurance corporation, BENEFIT CONSULTANTS, INC. a California corporation, and EQUIFAX SERVICES, INC., a Georgia corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

The petitioners, Janine and Joseph Adamick and the Estate of Kathleen Jo Price respectfully submit this reply brief to the brief in opposition filed only by respondent Amex, Inc., pursuant to Supreme Court Rule 15.6, and respectfully suggest that the court consider sanctions against Amex and its counsel, LeFebrve, Barron & Oakes, under Supreme Court Rule 8.2.

Petitioners respectfully show the court that:

(a) The Notice Of Appeal was timely filed on March 25, 1991, App. 3 hereto, pursuant to an extension of time granted by the district court, App. 1, from the District Court's Order of January 25, 1991, Br. in Opp. App. 25 and 26, from the Order certified under Fed. R. of Civ. Pro. 54(b), entered on November 26, 1990, as a partial judgment, Pet. App. 8-11. The motion to amend the Nov. 26, 1990 Order was timely under F.R.C.P.

The Notice Of Appeal clearly advised the court of appeals that an extension had been granted, App. 4-5.

The petition in this court was timely. It was due on February 29, 1992, pursuant to an extension of time granted by Justice O'Connor, but not filed until Monday, March 2, 1992, Feb. 29 being a Saturday.

(b) Amex misstated at page 2 of its Brief that the motion for rehearing was denied on January 22, 1991 instead of the true date, January 25, 1991.

(c) The issue of whether Fireman's must pay the insurance proceeds was not before the court of appeals and is not before this court, as the district judge specifically stated that "other matters" "are the subject of deferral by this court to the good judges of the Eighth Judicial District Cour, Judgment, App. 9-11. at 10, and Br. in Opp. App. 16, wherein the

district court stated that it:

> "makes no finding, binding on any court, with regard to the ultimate issue presented herein, to wit, whether Amex, . . has any liability to JANINE M. ADAMICK, the ESTATE OF KATHLEEN JO PRICE or JOSEPH ADAMICK to pay pursuant to insurance certificate DVA-525-3197."

AMEX's counsel attempt to mislead this court by stating there was a "final judgment," Br. in Opp. 3, 2nd ¶, without qualifying that it was certified under Rule 54(b) as not final as to all issues.

(d) Petitioners apparently have been mistaken in believing that the court of appeals arbitrarily "unconsolidated" the two lower court cases, as it appears that the district court clerk or her deputies took it upon herself to send misleading notices to the court of

that the first appeal concerned only CV-S-146-HDM, Fireman's v. Janine Adamick and the Estate of Kathleen Price, and that the second one, as to return of the proceeds bond to Amex, concerned only CV-86-306, Janine Adamick, et al. v. Nevada Federal Credit Union, et al.

Amex further deceives this court by stating that the "action" involved a dispute betweene Fireman's and a number of insurance companies and the insured, Br. 2, whereas Fireman's alone filed the case against Janine Adamick, and continued with the suit after Judge Foley ruled that Fireman's was not entitled to any medical records of Price, App. 8-9.

The court of appeals does not receive the record until after the answering brief is filed.and relies only on inaccurate papers of the district court.

The court may also have erroneously believed that the first appeal was

untimely as its own docketing statement does not show an order granting an extension of time to file the Notice of Appeal and it also has the errors as to parties noted in the petition.

CONCLUSION

The petitioners respectfully suggest that this Honorable Court grant the petition and remand this action to the court of appeals for the reasons stated above for further proceedings, including allowing petitioners to file an Opening Brief, rather than the proposed two Opening Briefs, and only one Excerpts of Record and one record, or that the lower court remand to the district court for entry of a final order.

Respectfully submitted,

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Attorney for Petitioners

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, IND, n/k/a AMEX, INC, Plaintiff/ counterdefendant, vs. JANINE ADAMICK, individually; ESTATE OF KATHLEEN JO PRICE, Deceased, Defendants/ separate Counterclaimants.	CV-85-146-HDM NEVADA (Las Vegas) BASE FILE
JANINE ADAMICK and JOSEPH ADAMICK, individually; ESTATE OF KATHLEEN JO PRICE, Deceased, Plaintiffs, vs. NEVADA FEDERAL CREDIT UNION, etc., et al., Defendants.	CV-S-86-306-HDM O R D E R FILED March 1, 1991

ORDER

It is Ordered that plaintiffs' Parte Motion For An Extension Of Time To File A Notice of Appeal is granted and they have to March 27, 1991 to file a Notice Of Appeal.

DATED March 1, 1991

s/s Howard McKibben

Howard McKibben

United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, IND, n/k/a AMEX, INC, Plaintiff/ counterdefendant, vs. JANINE ADAMICK, individually; ESTATE OF KATHLEEN JO PRICE, Deceased, Defendants/ separate Counterclaimants.	CV-85-146-HDM NEVADA (Las Vegas) BASE FILE
JANINE ADAMICK and JOSEPH ADAMICK, individually; ESTATE OF KATHLEEN JO PRICE, Deceased, Plaintiffs, vs. NEVADA FEDERAL CREDIT UNION, etc., et al., Defendants.	CV-S-86-306-HDM NOTICE OF APPEAL FILED MARCH 25, 1991

NOTICE OF APPEAL

Notice is hereby given that JOSEPH and JANINE ADAMICK and the ESTATE OF KATHLEEN JO PRICE, Deceased, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment entered on January 25, 1991, granting judgment in favor of AMEX, INC., except that of the liability of AMEX, INC. to pay insurance proceeds, and the Order "referring" said issue to the state court and awarding attorney's fees and denying the Adamicks' motions.

The Adamicks also appeal from all previous Orders purportedly dismissing other defendants pursuant to Fed. R. of Civ. Proc. 54(b), in these consolidated actions, and all other adverse Orders entered herein, without waiving their objections that there is no final order herein as to all claims and all parties.

An extension of time to March 27,

1991 was granted to file this Notice Of Appeal.

/s/ JANICE M. HAYES, ESQ.
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3391 S. El Camino Rd.
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Attorney for JOSEPH and
JANINE ADAMICK and THE
ESTATE OF KATHLEEN JO PRICE,
Deceased.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, Plaintiff/Appellee, vs. JANINE ADAMICK, et al., Defendants/Appellants.	No. 91-15575 DC# CV-85-0146-HDM Nevada (Las Vegas) ORDER (Filed June 12, 1991)

The court is in receipt of appellants' motion to dismiss the appeal without prejudice and to hold all proceedings and requirements in abeyance until appellants' said motion is decided. The motion is unclear in light of the June 3, 1991 Order. The motion is denied without prejudice to a renewed motion which includes clarification of the requested relief.

This order is subject to reconsideration by a judge if any objection is filed

within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Robert Allen
Robert Allen
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, INC., Plaintiff, vs. JANINE ADAMICK, Defendant.	CV-LV-85-146-RDF Nevada (Las Vegas) ORDER ENTERED (July 17, 1985)

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ORDER

Defendant Janine Adamick's motion to dismiss for want of subject matter jurisdiction and for failure to join indispensable parties is DENIED.

Defendant's motion to dismiss for failure to state a claim upon which

relief can be granted is also denied, except as to the claim that Fireman's is entitled to Kathleen Jo Price's medical records, on which claim, motion is GRANTED.

DATED June 14, 1985

/s/ Roger D. Foley

Roger D. Foley

United States
District Judge